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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 41

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

v.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

BRIEF IN BEHALF OF PETITIONER

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October 4, 1946.

INDEX

	PAGE
STATEMENT	1
POINTS:	
I The Circuit Court of Appeals erred in not dismissing the appeal to it on the ground that without recognizable excuse the appeal was not docketed with it nor the transcript of record filed with it until long after the expiration of time permitted by Rule 73(g) of the Federal Rules of Civil Procedure	2
II The Circuit Court of Appeals erred in the conclusion of law that there is a judicial rather than an administrative question involved in determining whether the work of employees of interstate motor carries affects safety of operations	7
III In any event in the present case the Court of Appeals erred in the failure to understand correctly the meaning of the Commission's own previous determination that the work of "loaders", as a category, affects safety of operations regardless of the time spent inside the vehicles	14
IV The matter of burden of proof	19
CONCLUSION	20

TABLE OF CASES

Ainsworth v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3)	5
American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422	11, 12

PAGE

Burke v. *Canfield*, 111 F. 2d 526 (C. A. D. S.) 5, 6

Great Northern R. R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285 11

Ill. Cent. R. Co. v. *P. U. C.*, 245 U. S. 493 18

Lambert Run Coal Co. v. *B. and O. R. Co.*, 258 U. S. 377 18

Missel v. *Overnight Transportation Co.*, 316 U. S. 527 10
Mutual Benefit Health & Accident Ass'n. v. *Snyder*, 109 F. 2d 469 (C. C. A. 6) 5

North Dakota ex rel. Lemke v. *C. and N. W. R. Co.*, 257 U. S. 485 18

Order of Ry. Conductors v. *Pitney, etc.*, (Sup. Ct. U. S.) decided Jan. 14, 1946 11

Re Maximum Hours, 28 M. C. C. 125 ..... 16, 19

Southland Gasoline Co. v. *Bayley*, 319 U. S. 44 10
Standard Oil Co. v. *U. S.*, 283 U. S. 235 11
State of Texas v. *I. C. C.*, 258 U. S. 158 18

U. S. v. *American Trucking Associations, Inc.*, 310 U. S. 534 ..... 8, 10

U. S. v. *Gallagher*, 151 F. 2d 556 ..... 5, 7

Venner v. *Michigan Cent. R. Co.*, 271 U. S. 127 18

W. P. Brown & Sons v. *L. & N. R. R. Co.*, 299 U. S. 393 11

STATUTES

Fair Labor Standards Act: PAGE

Section 7 ..... 1, 2
Section 207 ..... 8, 9, 10
Section 213 20
Section 213(b) 8, 9

Federal Rules of Civil Procedure:

Rule 73(a) 2, 3, 4, 5, 7
Rule 73(g) 2, 3, 4, 5, 6, 7

United States Code of Laws, Title 49:

Section 304 ..... 7, 8

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BRIEF IN BEHALF OF PETITIONER

Petitioner, Pyramid Motor Freight Corp., is an interstate motor truck common carrier of general property for compensation operating over highways between New York City, on the north, and Philadelphia, on the south. It was sued in the City Court of the City of New York by certain of its former employees for claimed unpaid overtime compensation, liquidated damages, and counsel fees, because of asserted violations of Section 7 of the Fair Labor Standards Act by the petitioner employer.

The action was removed by the employer to the United States District Court for the Southern District of New York which, on February 14, 1945 (Rec. 51), after two

opinions (Rec. 31 and 45) dismissed the action as to all the suing employees. (Reported in 54 Fed. Supp. 565 and 59 Fed. Supp. 341.)

On belated appeal proceedings to it the United States Circuit Court of Appeals for the 2nd Circuit, on December 28, 1945 sustained the judgment of dismissal as to one of the former employees (Shapiro) but reversed as to the others (Rec. 68). Its decision is reported in 152 Fed. 2d 619.

This Court, on March 25, 1946, granted certiorari to the 2nd Circuit Court of Appeals with respect to each of the grounds theretofore presented to it in the Petition for Certiorari filed in this Court by the petitioner employer (Rec. 70).

A statement of the facts and the issues concerning the claim of violation of Section 7 of the Fair Labor Standards Act is delayed in this brief for petitioner because at the threshold of the case it is necessary first to conclude whether the Circuit Court of Appeals erred in failing to dismiss the appeal to it for non-observance of Rule 73 (a) (g) of the Federal Rules of Civil Procedure.

I

The Circuit Court of Appeals erred in not dismissing the appeal to it on the ground that without recognizable excuse the appeal was not docketed with it nor the transcript of record filed with it until long after the expiration of time permitted by Rule 73(g) of the Federal Rules of Civil Procedure.

Rule 73(g) of the Federal Rules of Civil Procedure requires that within 40 days of a "notice of appeal" in the District Court the would-be appellant must docket his appeal in the Circuit Court of Appeals and file therein within that time the record on appeal. The District Judge may, within that period of 40 days, extend to a total of 90

days the time within which docketing of the appeal and filing of the record may occur.(*)

Rule 73(a) in substance provides that a party may appeal from a judgment by filing with the District Court a "notice of appeal". It then further states that failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not of itself affect the validity of the appeal but, when no other remedy is specified in the Rule, is ground for such action as the appellate court deems appropriate which "may" include dismissal of the appeal.(**)

Here, in this action, while notice of appeal was promptly given in the District Court by the attorney of record soon after entry of judgment, *nearly five months elapsed before the appeal was docketed in the Circuit Court of Appeals or the record on appeal filed therein. The District Court did*

(*) "*Docketing and Record on Appeal.* The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal." (Rule 73(g)).

(**) (a) *How Taken.* When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal but is ground only for such remedies as are specified in this rule, or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. (Rule 73(a)).

not, within 40 days of the date of notice of appeal, extend or have before it an application to extend the time.

From the Bench the Court of Appeals, without opinion, denied a separate motion to dismiss the appeal (R. 63). Upon renewal of the motion for dismissal the Circuit Court of Appeals held that the appeal was not dismissable (R. 65) because it presented "substantial questions" even though the excuse for the delay of docketing and filing of the record was "feeble".(*)

Here then, the 2nd Circuit Court of Appeals has virtually emasculated the right to repose afforded successful litigants in the District Courts by an assumption of authority to entertain belated appeal proceedings undertaken without semblance of regard to the time requirements of Rule 73(a), (g) of the Federal Rules of Civil Procedure. The attitude of the 2nd Circuit Court of Appeals in this case is that it will not dismiss, under Rule 73(a), an appeal regardless of the delay of docketing and filing of record with it and even though the excuse for the delay be "feeble", if it appears to that court that "substantial questions" as to the rightness of the judgment of the District Court on the merits are present.

The declination to dismiss was not based upon the amount of the delay. It was not based upon a showing of sufficiency of excuse for the delay. Instead that court put aside all the time limit requirements of Rule 73(g) and the lack of proper excuse for the delay and looked only to see if a "substantial question" was presented by the belated appeal.

As a consequence would-be appellants would now be both allowed and encouraged to pay no attention to the

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(*) The notice of appeal was served March 29, 1945.
Forty days therefrom expired May 8, 1945.
July 19, 1945, a single judge of the Circuit Court of Appeals undertook to extend the time to September 1, 1945.
The appeal was docketed and the record on appeal filed approximately September 1, 1945.

time limits of Rule 73(g) and to depend hereafter only upon a substantial claim of error in the judgment of the District Court. Since, of course, they would not prevail anway in the Court of Appeals unless they demonstrated error in the judgment no risk would be run by those would-be appellants in simply ignoring Rule 73(g) as to the time for docketing their appeals and filing their records. The 2nd Court of Appeals says it will look only to see whether there is involved a substantial question of error in the judgment and not the time of docketing and filing of the record or the reason for the delay.

That view of the 2nd Circuit Court of Appeals, unless reversed in this case, would revolutionize Federal appellate practice throughout the country and virtually destroy the repose to successful litigants which Rule 73(g) was designed to assure.

The view of the Circuit Court of Appeals concerning its duty under Rule 73(a) is completely out of harmony with the view of other circuit courts of appeal on the same question. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83 (C. C. A. 3); *Mutual Benefit Health & Accident Ass'n.* v. *Snyder*, 109 F. 2d 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. 2d 526 (C. A. D. S.); *U. S.* v. *Gallagher*, 151 F. 2d 556. In those decisions not the slightest encouragement was given to the idea that the penalty of dismissal would be withheld, regardless of non-compliance with Rule 73(g), merely because, had the appeal been perfected in time, it would have been deemed that a good case for reversal of the District Court on the merits existed. On the contrary: in each of those cases, without reference to the merits of the judgment of the District Court, the Circuit Court of Appeals inquired only whether the delay in perfecting the appeal was due to "excusable" or "non-excusable" causes. In the *Ainsworth*, *Mutual Benefit* and *Burke* cases it was concluded that there had been shown to the appellate court sound and substantial reasons for the delay. In *U. S.* v. *Gallagher*, supra, however, the appeal was dismissed be-

cause of the delay, it having been determined by the Court of Appeals that no justifiable showing by way of excuse for the delay itself had been made. Whether the appeal otherwise would have had merit was not even considered.

Two members of the United States Supreme Court (the Chief Justice and Mr. Justice Rutledge) participated in the decision of the Court of Appeals for the District of Columbia in *Burke* v. *Canfield*, supra. In that decision that court of appeals warned the bar that the reserved authority "to save an appeal" prosecuted in disregard of Rule 73(g) "would be exercised sparingly" and only for good cause shown in the way of "excusable" delay.

The 2nd Circuit Court of Appeals here finds that the excuse given for the delay was "feeble". That was putting it mildly. What apparently took place was that after serving his notice of appeal the attorney of record in the District Court virtually abandoned the case. Months afterwards (on July 19, 1945) an entirely different attorney (Mr. Ramey) appeared on the scene before a single judge of the 2nd Circuit Court of Appeals with his affidavit in support of a request to that single judge to fix a still later date for docketing the appeal and filing the record (Rec. 53).

The gist of that representation was that the original attorney of record had engaged Mr. Ramey to be "his" attorney but after having done so very greatly delayed turning over all the papers in the case to Mr. Ramey. Then, it seems, according to the affidavit, Mr. Ramey had "stenographer trouble". To cap the climax it was further said in the affidavit that Mr. Ramey thought his partner (Mr. McKelvey) was attending to the appeal while Mr. McKelvey thought Mr. Ramey was! (See copy of that affidavit attached to petition for certiorari, page 51.) To call that recital of excuse for delay only "feeble" was gentle, especially since previously Mr. Ramey had been denounced in this action by Judge Fee for having been guilty of conduct toward him "virtually bordering on contempt". (Rec. 49).

When Mr. Ramey approached that single judge of the 2nd Circuit Court of Appeals the time limit under Rule 73(g) had already long since expired. But apart from that: when the time limits of Rule 73(g) have been ignored no single judge of a Circuit Court of Appeals may thereafter, with or without an affidavit, fix a still later date for docketing and filing of record. Rightly the Court of Appeals in *U. S.* v. *Gallagher, supra*, recently so held. Even when, under Rule 73(a), it could be determined that the delay was "excusable," the action to be taken by the Appellate Court would have to be by the court itself—not by only a single member.

If, therefore, the Supreme Court of the United States concludes that in this instance the 2nd Circuit Court of Appeals clearly abused its judicial discretion in failing to dismiss and has unwarrantably confused the meaning of and proper practice under the Rules of Civil Procedure, reversal upon that ground is due and further consideration of this action by the Supreme Court would then be unnecessary.

II

The Circuit Court of Appeals erred in the conclusion of law that there is a judicial rather than an administrative question involved in determining whether the work of employees of interstate motor carriers affects safety of operations.

Three years before the Fair Labor Standards Act was passed by Congress the Interstate Commerce Commission, in Paragraphs 1, 2, and 3 of Section 304 of the United States Code of Laws, Title 49, was given authority to establish "reasonable requirements" with respect to "qualifications and maximum hours of service of employees" of three kinds of interstate motor carriers—common, contract, and private. As to employees of private motor carriers, the statute in

terms limited the Commission's authority in that regard to those employees whose work affects safety of operation of motor carriers. As to employees of common and contract motor carriers the statute authorized the prescription of reasonable requirements as to qualifications and maximum service hours of "employees". Nevertheless this Court, five years later, by closely divided vote, concluded that the Commission's authority with respect to qualifications and maximum service hours of interstate motor common and contract carriers extended only to those whose work affects safety of operations (*U. S.* v. *American Trucking Associations, Inc.*, 310 U. S. 534).

It appears too late now for the motor carrier industry to bring that decision again under review although it is here permissible to call to attention that the decision of the Supreme Court was rendered May 27, 1940, more than two years after passage of the Fair Labor Standards Act. Yet in the Fair Labor Standards Act its overtime provisions in Section 207 have no application whatsoever *to any other type of public transportation agencies!*

When passed in 1938 Section 213(b) of the Fair Labor Standards Act caused Section 207 of that Act not to apply to "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49".

That choice of language by Congress in 1938, when enacting the Fair Labor Standards Act, was appropriate to the purpose (if such was the purpose) of leaving out from Section 207 of the Fair Labor Act all employees of motor common or contract carriers (like all employees of all other transportation agencies) while leaving out only those employees of private carriers those whose work affects safety of motor vehicle operations. As private carriers consist of shippers (engaged in production or distribution) owning or operating their own trucks the exemption of the Fair Labor Act properly should have been confined to those employees of industries whose work concerns safety of

truck operations. But as common and contract carriers are directly competitive with all other forms of transportation it has not seemed to this industry that Congress would have intentionally discriminated against it in favor of all other forms of transportation in subjecting some of its employees to Section 207 of the Fair Labor Act while leaving out all employees of all other types of transportation agencies.

However that may be the starting point in the present action apparently must be that the administrative authority of the Interstate Commerce Commission over the qualifications and maximum service hours of employees of motor common and contract carriers extends to those whose duties affect safety of operations and does not extend to those whose duties do not affect safety of operations. The exemption from Section 207 of the Fair Labor Standards Act exists or does not exist accordingly.

At once the question is precipitated as to who is to make the determination of which work categories affect safety of truck operations and which do not. The apparatus of administration of the exemption in Section 213(b) of the Fair Labor Act is not legislatively indicated.

Here, in the present action, the Circuit Court of Appeals seemingly has drawn to the judiciary the making of the determination. That, it is believed, is a fundamental error.

Had the Fair Labor Act never been passed it would not have been seriously questioned in any quarter that if the effect upon safety of vehicular operation properly should be the test of the authority of the Interstate Commerce Commission it would be initially the administrative duty of that Commission to make the determination. If, correctly, that Commission is to prescribe the qualifications and maximum service hours of those motor carrier employees whose work it deems affects safety, is it not an inherent administrative function of that Commission initially to determine which employee categories fall to the one side or the other of the line? Naturally its administrative determination would not be absolutely final and conclusive because, like any other order of the Commission, statutory court review of that

kind of order (whether affirmative or negative in form) would be proper. (*U. S.* v. *American Trucking Associations, Inc.*, supra.)

Yet here, because certain former employees of Pyramid Motor Freight Corporation sued in court to recover under Section 207 of the Fair Labor Act, the 2nd Circuit Court of Appeals appears to consider that it is a judicial function to determine whether or not the work of those suing employees affected in "substantial" measure the safety of truck operations.

It would seem clear that the subject matter cannot at one and the same time be administrative and judicial. When *Missel* v. *Overnight Transportation Co.*, 316 U. S. 527, was decided by this Court the Commission had already determined that the work of clerical employees did not affect safety of operations. This Court, in its opinion, so noted. It did not independently resolve the question as a judicial function. Later in *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, this Court concluded that since the Commission had determined that the work of drivers of trucks would affect safety of operations that circumstance alone was enough to defeat the damage recovery action by suing employees even though the Commission had not yet actually exercised the power possessed by it. This Court did not independently determine whether or not the work of truck drivers affected safety.

Were it to be a judicial function, in an action under the Fair Labor Act, to determine whether the character of work performed affected safety of operations it could be urged just as plausibly that the courts could answer the question in the affirmative (although the Commission may have answered it in the negative) as the reverse. If, however, it be the duty of the courts, in actions under the Fair Labor Act, to observe and be controlled by the Commission's own administrative determinations, then it would clearly follow that if, in a given instance, the Commission had not thus far made the administrative determination, it would be the

duty of the Commission and not the court to make it. Certainly that would appear to be so in anything resembling a "border line" case calling for highly expert technical experience and judgment.

Conceivably there could arise individual situations so very clearly on one side of the dividing line that a court, in an original action before it under the Fair Labor Act, could say that beyond peradventure of doubt the involved work category was completely remote from safety of operations and that therefore no administrative question could possibly be involved. But short of those possible extreme cases it would seem that ordinarily there is need to apply by close analogy the same rule governing division between the judicial and administrative authority which has long since been worked out by this Court in other situations where the expert investigatory administrative functions of the Commission and other administrative agencies were emphasized and deemed so important that necessarily the subject matter was taken to have been removed from the field of primary judicial concern. Of the numerous decided cases covering this broad ground the following are typical:

Great Northern R. R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285;

Standard Oil Co. v. *U. S.*, 283 U. S. 235;

W. P. Brown & Sons v. *L. & N. R. R. Co.*, 299 U. S. 393;

Order of Ry. Conductors v. *Pitney, etc.*, (Sup. Ct. U. S.) decided Jan. 14, 1946.

District Judge Fee in the present case, in his first opinion (Rec. 31), expressed the conviction that the work of the suing employees was so "closely akin" to that of employee categories whose work the Commission already had determined affected safety as to cause him to consider that probably at that time he should dismiss the suit. But perhaps because of the influence of this Court's decision in *American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308

U. S. 422, he at first in that opinion temporarily withheld judgment of dismissal for a reasonable time to allow the suing employees, if they so wished, to go before the Interstate Commerce Commission for an administrative determination of their status. It was not until long thereafter, when their purported counsel categorically refused, that Judge Fee, in his second opinion, determined finally upon dismissal (Rec. 45). It was during the interval between the two opinions that Mr. Ramey, in a succession of letters to Judge Fee, so berated the District Court as to cause Judge Fee to denounce the conduct of Mr. Ramey as "virtually bordering on contempt." (Rec. 49).

It might well be, then, that when a damage recovery suit is brought under the Fair Labor Act to the judiciary the first point of inquiry should be whether or not it appears that the work category into which the plaintiffs fall is one as to which the Interstate Commerce Commission has or has not determined, as an administrative body, whether work of the kind performed by them affects safety of operations. If so, then of course such a suit should be dismissed. If it should appear to such a court that the particular work category has *not* been so dealt with either way by the Commission, but yet there are present factual elements which provoke the need for expert administrative determination, the procedural course blocked out in the *El Dorado* case could well be adopted. In that way there could be accomplished the needed accommodation between the judicial and administrative functions. If, however, it appears that by no possibility could the involved work affect safety, then the court could proceed on its own to final judgment.

But at least it seems certain that in the present case the Circuit Court of Appeals clearly transcended its proper authority when undertaking, as it did, to draw to the judiciary the very complex and complicated task of determining in what way and to what extent the work of the suing employees affected safety of operations. The subject matter does not lend itself to categorical treatment on the basis of individual determinations. The motor carrier

industry is a vast one. It employs over a million people. Inevitably the determination of the relationship to safety of carrier operations must proceed along somewhat broad lines of work categories without subtle refinements and qualifications. The treatment should not be "scholastic". To enter upon a meticulous inquiry as to the hours and minutes of any given day or week spent by individuals in a particular work category in the doing of those precise things which bear the most intimately upon safety, would be nearly impossible and if possible at all would introduce so many elements of doubt, uncertainty, competitive inequalities and variabilities from week to week as to disenable successful conduct of the business.

With respect to railroad employees the Interstate Commerce Commission has a similar authority to prescribe maximum service hours for those whose work the Commission deems affects safety and there follow certain consequences when railroads fail to comply with the Commission's directions. Railroad telegraphers are deemed by the Commission to perform work of a character which concerns safety of railroad operations. But not all railroad telegraphers spend all of each of their working hours at the keys. They do much paper work. Often they handle freight. They have considerable amounts of idle time watchfully waiting but doing no actual labor. Would it be a proper judicial function to say that while, as a category, railroad telegraphers perform work affecting safety but that unless a particular railroad telegrapher devotes 20 per cent or more of his time actually manipulating the keys or transcribing incoming messages then that his work does not affect safety?

So, too, here: did not the 2nd Circuit Court of Appeals err in the assumption of authority to introduce its own idea as to how much of their time in the course of a given week the work of those engaged solely as truck "loaders" must consist only of standing *inside* trucks actually stacking and piling the freight in *outgoing* vehicles (proof of which it said should be offered by the employer, going back

over six or more years) and that if it be less than 20 per cent. of all the weekly work of truck "loaders" their work does not "affect" safety of operations?

The judiciary is not well equipped to deal with those sorts of problems. Their determination calls for industry-wide investigation and conclusion. It calls for expertness in the peculiar field of transportation and especially the intricate field of the motor truck industry. Safety of persons upon the highways as well as the men employed by the companies compels a much broader base of understanding and treatment than can be achieved in the catch-as-catch-can experience of an individual court trial of a damage suit.

III

In any event in the present case the Court of Appeals erred in the failure to understand correctly the meaning of the Commission's own previous determination that the work of "loaders", as a category, affects safety of operations regardless of the time spent inside the vehicles.

As to the employees who sued in this particular case the facts were agreed (Rec. 24). Pyramid Motor Freight Corp. has its main terminal in New York City on West 11th Street. There the larger part of its merchandise freight comes in during the early mornings, it is then unloaded from the road vehicles into the terminal (some of it into the terminal warehouses), later in the morning much of it is reloaded into city vehicles, and then again unloaded from those city vehicles into industry and office buildings near which the vehicles are parked. In the late afternoons the Company employees go into the city buildings and bring out the freight packages to the parked truck vehicles which, when filled, then go to the main terminal on 11th Street where the freight is unloaded from those vehicles and thereafter reloaded into road vehicles which go southward to or in the direction of Philadelphia.

The garment center of New York City is, however, a concentrated area of extremely high freight traffic density and presents peculiar and difficult street and other traffic problems. To serve its patrons in that particular small area the company located a sub-terminal near the middle of it. Northbound from Philadelphia and intermediate places the road vehicles would come during the early hours of the mornings first to the main terminal on 11th Street. There a change of vehicle crews occurred and the vehicles, without there being unloaded, resumed their journeys to the sub-terminal in the garment center. At that place the work was variable. Often the contents of those vehicles would be unloaded in the sub-terminal and later in the morning delivered by hand or handtruck to the nearby loft buildings. At other times those truck vehicles would park along the city streets in the garment center where the unloading operations and delivery direct into the buildings occurred.

Late in the afternoons the outgoing freight packages would be taken out of the loft buildings and loaded into the parked trucks, which then would go their way or the freight would be taken to the sub-terminal and there loaded or further loaded for their direct outbound journeys.

Like any other loaders the employees here suing did the loading and unloading work at the sub-terminal or into and out of the parked vehicles in the garment center. Their work, in kind, corresponded precisely to that of loaders at the main terminal. It differed only in the respect that the loading of the truck vehicles was generally direct from the loft buildings (but sometimes from the sub-terminal) and so was the unloading but sometimes at the sub-terminal.

Necessarily not all the members of these crews of loaders always stood inside of the truck vehicles actually stowing and stacking the outgoing freight. Their daily work consisted of both loading and unloading. Furthermore, as at the main terminals of nearly all motor truck companies not all members of the loader gangs would stand inside the truck vehicles at one time. They would rotate,

one or two putting inside the truck vehicles and the others placing the packages on the tailboards. Those who might be inside the vehicles one day would not be the next.

Both the District Court and the 2nd Circuit Court of Appeals appear to have concurred in the view that the work of these suing employees (other than Shapiro who was a helper) was so "closely akin" to that of loaders at the main terminals as to come within all the purposes of the Interstate Commerce Commission when, in *Re Maximum Hours*, 28 M. C. C. 125, it determined the work of "loaders" to affect safety of operations. There the Commission said:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are *to load and unload motor vehicles and transfer freight between motor vehicles and between vehicles and the warehouse.*" (Italics supplied).

Substitute the word "building" for "warehouse" and the Commission's description of the work of "loaders" precisely fits that of the suing employees at petitioner's sub-terminal or on the city streets.

The Commission well knew that men employed "solely" as "loaders" also engage in *unloading* and that the time so spent (about one-half) does not affect safety of operations. So, too, the Commission well knew that the tasks of loaders are not confined to the standing inside of the *outgoing* vehicles piling and stacking. It knew (and so said) that their work includes also time spent in "hand trucking" from one vehicle to another *and between vehicles and warehouses.* Those different but related tasks are all components of the work of "loaders". But the Commission was not guided by the thought and most certainly did not intimate that even though a man be employed solely as a loader only that part of his time spent inside an

outgoing truck stacking and piling would have to be determined and measured in its proportion to the whole of his task as a loader, next that it would be necessary to arrive at some arbitrary percentage as if warranted by the law and in that way conclude whether safety of operations calls for the Commission's prescription of their mental and physical qualifications and the maximum hours of time to be devoted by them to their several intimately related tasks.

Here, however, the 2nd Circuit Court of Appeals has wrongly attributed to the Commission exactly that strange intent. It reads the Commission's opinion as saying that there are two broad divisions of motor carrier employees—those the nature of whose work "substantially" affects safety of operations and those whose work does not. From that interpretation the court proceeds to arrive at an impression (quite erroneous) that the Commission meant no more than to identify the different work categories falling into those two broad divisions. The court says that while the Commission determined that those work categories consisting of "drivers", "loaders", "helpers" and "mechanics" were deemed by it substantially to affect safety of operations yet that the Commission meant thereby to leave it open for the judiciary to inquire as to the component parts of the daily work of those employees and to break it down into percentages according to which the Commission's authority existed or did not with respect to each *individual* employee in those respective categories.

It is respectfully submitted that the Commission meant nothing of the kind. It has never said that the work of railroad telegraphers affects safety of operations only when 20 per cent of some other arbitrary percent of their time is spent in working the keys or receiving messages. Nor has it ever said that the work of truck loaders affects safety of operations only when as much as 20 per cent or some other arbitrary percentage of their time is spent inside truck vehicles stowing and stacking outgoing freight. The court simply misunderstood the Commission's ad-

ministrative determination. The test of "substantiality" was applied by the Commission, and meant by it to be applied, only in respect to work categories as a whole—not to the components of the work of each individual in the respective categories.

That determination of the Commission is capable of direct statutory court review. It is not, however, capable of addition or subtraction or a frittering away by the judicial process of refinement and qualification never envisaged by the Commission itself. That would be in substance a "collateral attack" on the Commission's own administrative action and may not occur. (*Wenner* v. *Michigan Cent. R. Co.*, 271 U. S. 127; *State of Texas* v. *I. C. C.*, 258 U. S. 158; *North Dakota ex rel. Lemke* v. *C. and N. W. R. Co.*, 257 U. S. 485; *Lambert Run Coal Co.* v. *B. and O. R. Co.*, 258 U. S. 377; *Ill. Cent. R. Co.* v. *P. U. C.*, 245 U. S. 493.)

If, at a small railway station, the agent operates the telegraph keys along with his other varied duties, including much paper work and actual freight handling, are not the maximum hours of his daily labor (of all kinds) and his qualifications important even though only 20 per cent of his time may be spent at the telegraph keys? Would not a tired-out railroad employee likely err in judgment at a critical moment whether his fatigue came from long hours of paper work, or freight-handling, rather than long hours at the keys? Similarly as to truck loaders: the critical part of their work as bearing upon safety of operations is chiefly the stowing and stacking of freight in the outgoing vehicles. But it is then that clarity of thinking and the exercise of sound judgment is called for. Can it be immaterial to safety of operations what their maximum service hours are to be and what are their physical and mental qualifications simply because in the course of a given day the time consumed by them in hand-trucking between the platforms and buildings (whether terminal or industrial) or from one truck to another, or in unloading as distinguished from loading may account for 80 per cent of the whole?

At any rate are not these administrative questions; and did not the Commission, in its report in 28 M. C. C. 125, reveal its whole thought when, in respect to "helpers", it said:

> "We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least they all engage in activities which directly affect safety of operation. *An attempt to limit our jurisdiction over them in accordance with the degree in which they engage in such activities would create confusion and continual controversy.* They will be included in the category of helpers". (Italics supplied).

Properly the 2nd Circuit Court of Appeals in the present case should have determined that the Commission already had administratively passed upon the work of "loaders" with full knowledge of its different component parts and the variability of time devoted to each; that properly the Commission had concluded not to be governed by those proportions of time when dealing with employees whose work consisted solely of that of being "loaders" as defined by the Commission; and that consequently this suit should be dismissed. In any event the problem was administrative, not judicial, even if the Commission had not already dealt with it.

IV

The matter of burden of proof

Proceeding from its faulty premises as to its own authority and as to what the Commission had held or not held the 2nd Circuit Court of Appeals in the present action appears to have considered that there therefore rested upon the Pyramid Motor Freight Corp. a burden of proof to

show that during each week over a term of nearly six years each of the suing employees spent as much as or more than 20 per cent of his working time inside truck vehicles stowing and stacking outgoing freight. From any point of view a burden of that kind would be impossible for an employer to sustain. Employees engaged as loaders do not have uniformity of time each day or each week in the performance of their intimately related component tasks as loaders. They naturally have not kept time records of those variables. Nor of course did the employees keep any. The general rule regarding the "burden of proof" is that the required information must come from the person in best position to furnish it. Certainly the employer in a situation of this kind never would be in a position to know the facts. To throw upon the employer any such burden in the motor truck industry would be equivalent to holding that Section 213 of the Fair Labor Act is meaningless.

Conclusion

The judgment of the Circuit Court of Appeals as to all the respondents other than Shapiro should be reversed and the judgment of the United States District Court affirmed.

Respectfully,

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